Mark Lindsey
Patent Agent
One Becton Drive, MC110
Franklin Lakes, New Jersey 07417-1880
Phone: 201.847.6262
Fax: 201.848.9228
E-Mail: mark_lindsey@bd.com

FAX

BD
Helping all people live healthy lives

Attention: Commissioner for Patents

Company: United States Patent and Trademark Office

Fax number: (571) 273-8300

From: Ursula Polignone for MARK LINDSEY

Date: July 15, 2005

Number of Pages (including this cover): 10

If you do not receive all of the pages, please call: Ursula Polignone 201- 847-5728

Applicant(s):	Daniel Schwarz et l	Atty. Docket No.:	P-5204
Serial No.:	09/921,542	Group Art Unit:	1723
Filed:	August 3, 2001	Examiner:	D. Sorkin
For:	An Improved System for Stirring Suspended Solids in a Liquid Media		

The following documents are attached to this facsimile:

1. Appeal Brief – 9 pages

RECEIVED
CENTRAL FAX CENTER
JUL 15 2005

PATENT
P-5204

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Serial No.	09/921,542	Confirmation No.:	6838
Applicant(s)	Daniel L. Schwarz et al	Examiner:	D. Sorkin
Filed:	August 3, 2001	Docket:	P-5204
Group Art Unit:	1723	Customer No.:	26253
Title:	An Improved System for Stirring Suspended Solids in a Liquid Media		

I HEREBY CERTIFY THAT THIS CORRESPONDENCE IS BEING FAXED (571) 273-8300 TO: Board of Patent Appeals and Interferences, P.O. BOX 1450, ALEXANDRIA, VA 22313-1450

BY: URSULA M. POLIGNONE
(NAME)

Ursula M. Polignone 7/15/05
(SIGNATURE) (DATE)

Board of Patent Appeals and Interferences
United States Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

APPEAL BRIEF

REAL PARTY IN INTEREST

The real party in interest in the present Appeal is Becton, Dickinson and Company, the owner and assignee as evidenced by the assignment set forth at Reel 012457, Frame 0770.

RELATED APPEALS AND INTERFERENCES

The Appellants, the Appellants' legal representative, and the assignee are not aware of other related appeals or interferences that will directly affect, be directly affected by, or have a bearing on the Board's decision in the pending Appeal.

STATUS OF THE CLAIMS

Claims 1-4 and 6-10 stand finally rejected by the Examiner as noted in the Office Action dated March 15, 2005. Claims 5 and 11-18 are cancelled. The rejection of claims 1-4 and 6-10 is appealed.

STATUS OF THE AMENDMENTS

There are no outstanding amendments.

SUMMARY OF CLAIMED SUBJECT MATTER

The claimed invention is a system (100) for stirring a solid suspended in a liquid media in a sample vessel. (See Fig. 1 and paragraph [0029]). This system comprises a sample vessel which is in the form of a sample vial (102). (See Figs 1, 2, 3, 5, 7 and 9 and paragraph [0032]) As reflected, e.g., in Figs. 2, 3 and 7, and discussed at paragraph [0030], the system further comprises a panel (106) containing one or more openings (110) in which sample vessels are held, where the openings are tilted with respect to the horizontal such that the sample vessels, when held in the openings, are tilted at an angle substantially less than 90 degrees with respect to the horizontal (see also Fig. 9). The system further comprises a stirrer (162) within the sample vessel (see Figs. 9 to 12), wherein the stirrer includes a ferrous metal (see paragraph [0038]). In addition, as shown, e.g., in Figs. 2, 3 and 5 to 8, the system comprises a magnet driver (114, 116), adapted to move a magnet (154) proximate to an outer surface of the sample vessel to permit said magnet to impose a magnetic influence on the ferrous metal in the stirrer to move the stirrer in said sample vessel. The magnet rotates about an axis 90 degrees with respect to the longitudinal axis of the sample vessel. (See Fig. 9 and paragraph [0040]).

GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

Claims 1-4 and 6-10 stand rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent application No. 2,974,018 to McNeilly ("McNeilly").

ARGUMENT

A. Claims 1-4 and 6-10 are not anticipated by U.S. Patent No. 2,974,018 to McNeilly ("McNeilly")

1. Claim 1

Claim 1 is directed to a system for stirring a solid suspended in a liquid media in a sample vessel, the system comprising, among other things: a panel, containing one or more openings in which sample vessels are held, where the openings are tilted with respect to the horizontal, such that the sample vessels, when held in the openings, are tilted at an angle substantially less than 90 degrees with respect to the horizontal.

The Examiner has refused to give patentable weight to the term "horizontal" in claim 1, stating, among other things, that the term is merely an intended use. See, e.g., Paragraphs 2-4 of the Office Action dated March 15, 2005. Based on this position, the Examiner has presented and maintained the rejection over McNeilly.

It is well established that "claim language should be read in light of the specification as it would be interpreted by one of ordinary skill in the art." In re Am. Acad. Of Sci. Tech. Ctr., 367 F.3d 1359, 1364, 70 U.S.P.Q.2d 1827, 1830 (Fed. Cir. 2004). Appellants believe the Examiner has not done so for claim 1.

The Examiner has improperly ignored the "horizontal" language in claim 1, by failing to read the claim in the context of the specification, from the perspective of one skilled in the art. In particular, Appellants submit that, in the context of, e.g., Figures 3, 7 and 9 (see in particular the dashed line and angle notation in Fig. 9) and paragraphs [0030] and [0037], one skilled in the art would have no trouble understanding the scope and bounds of the invention, including the relative orientation of the sample vessels.

Given a proper consideration of claim 1, it is clear that McNeilly does not anticipate the claim. McNeilly teaches an improvement to the Van Slyke volumetric apparatus for determining the gas content of blood, of the type where mercury is used as the confining fluid. McNeilly discloses, as reflected in Figs. 1, 2 and 3, an upright sample vessel (46) containing a stirring bar (50) comprising of magnetic material, a first magnet (74) adjacent to the vessel, means (72) (76) for rotating the first magnet, and a second magnet (78) fixedly mounted adjacent to and above the first magnet, the second magnet also being adjacent to the upright sample vessel.

McNeilly fails to disclose at least the claimed features of: a panel, containing one or more openings in which sample vessels are held, wherein the openings are tilted with respect to the horizontal, such that the sample vessels when held in the openings are tilted at an angle substantially less than 90 degrees with respect to the horizontal. McNeilly's claimed device clearly requires an upright sample vessel (46), i.e., at 90 degrees to the horizontal, in order to allow accurate volumetric gas readings of the graduated tube (54). In fact, the function of the device of McNeilly would be destroyed if its vessel was modified to achieve the orientation of the Appellant's claim 1.

For these reasons, Appellants submit that claim 1, and therefore dependent claims 2-4 and 6-10, are not anticipated by the McNeilly reference.

2. Claims 2 and 3

Claim 2 is directed to a system as claimed in claim 1, wherein the magnet driver device comprises, among other things, a motor, adapted to move the magnet shaft assembly to move the magnet proximate to the outer surface of the sample vessel and away from the outer surface of the sample vessel.

Claim 3 is directed to a system as claimed in claim 2, wherein the motor rotates the magnet shaft assembly to move the magnet proximate to the outer surface of the sample vessel and away from the outer surface of the sample vessel.

In addition to the reasons discussed above for claim 1, McNeilly fails to disclose at least the following features of claims 2 and 3: a motor and magnet shaft assembly which moves a magnet toward and away from the outer surface of the sample vessel. In contrast, McNeilly discloses a permanent bar magnet (74) which remains a constant distance from the extraction chamber (46) during its rotation.

For these additional reasons, Appellants submit that claims 2 and 3 are not anticipated by the McNeilly reference.

4. Claim 7

Claim 7 is directed to a system as claimed in claim 1, wherein the magnet driver is further adapted to move the magnet away from the outer surface of the sample vessel to allow gravity to move the stirrer toward a bottom of the sample vessel.

In addition to the reasons discussed above for claim 1, McNeilly also fails to disclose at least the claimed features of: a magnet driver further adapted to move the magnet away from the outer surface of the sample vessel to allow gravity to move the stirrer toward a bottom of the sample vessel. McNeilly discloses a permanent bar magnet (74) which remains a constant distance from the extraction chamber (46). The stirring bar (50) of McNeilly drops when two permanent bar magnets (74 and 78) become fully opposed, thereby weakening the magnetic field of the bar magnet (78) sufficiently for the stirring bar (50) to drop from its own weight down into the extraction chamber (46).

For these reasons, Appellants submit that claim 7, is not anticipated by the McNeilly reference.

5. Claim 9

Claim 9 is directed to a system as claimed in claim 1 and is directed to, among other things, the panel being adapted to receive a plurality of the sample vessels, and the magnet driver adapted to move each of a plurality of magnets proximate the sample vessels.

In addition to the reasons discussed above for claim 1, McNeilly also fails to disclose at least the claimed features of: a panel that is adapted to receive a plurality of the sample vessels, and a magnet driver adapted to move each of a plurality of magnets proximate the sample vessels. McNeilly holds a single vessel (46) and has a single moving magnet (74).

For these additional reasons, Appellants submit that claim 9, is not anticipated by the McNeilly reference.

6. Claim 10

Claim 10 is directed to a system as claimed in claim 1, wherein the panel is adapted to maintain the sample vessel at an angle which is within the range of about 15 degrees to about 25 degrees with respect to the horizontal.

In addition to the reasons discussed above for claim 1, McNeilly clearly fails to disclose this specific angular range. As noted above, McNeilly holds its vessel at an angle of 90° to the horizontal.

For these additional reasons, Appellants submit that claim 10, is not anticipated by the McNeilly reference.

CONCLUSION

For the reasons above, Appellants respectfully request withdrawal of all rejections and allowance of claims 1-4 and 6-10.

CLAIMS APPENDIX

1. A system for stirring a solid suspended in a liquid media in a sample vessel, said system comprising:

a sample vessel, which is in the form of a sample vial;

a panel, containing one or more openings in which sample vessels are held wherein said openings are tilted with respect to the horizontal such that said sample vessels when held in said openings are tilted at an angle substantially less than 90 degrees with respect to the horizontal;

a stirrer within said sample vessel, wherein said stirrer includes a ferrous metal; and

a magnet driver, adapted to move a magnet proximate to an outer surface of said sample vessel to permit said magnet to impose a magnetic influence on said ferrous metal in said stirrer to move said stirrer in said sample vessel, and wherein said magnet rotates about an axis 90 degrees with respect to the longitudinal axis of said sample vessel.

2. A system as claimed in claim 1, wherein said magnet driver device comprises:

a magnet shaft assembly having said magnet coupled thereto; and

a motor, adapted to move said magnet shaft assembly to move said magnet proximate to said outer surface of said sample vessel and away from said outer surface of said sample vessel.

3. A system as claimed in claim 2, wherein:

said magnet shaft assembly is rotatable; and

said motor rotates said magnet shaft assembly to move said magnet proximate to said outer surface of said sample vessel and away from said outer surface of said sample vessel.

4. A system as claimed in claim 2, wherein:

said motor is magnetically coupled to said magnet shaft assembly.

5. (Cancelled)

6. A system as claimed in claim 1, wherein:

said magnet driver is adapted to move said magnet such that said magnetic influence moves said stirrer along a side wall of said sample vessel.

7. A system as claimed in claim 1, wherein:

said magnet driver is further adapted to move said magnet away from said outer surface of said sample vessel to allow gravity to move said stirrer toward a bottom of said sample vessel.

8. A system as claimed in claim 1, wherein:

said magnet includes a rare earth magnet.

9. A system as claimed in claim 1, wherein:

said panel, is adapted to receive a plurality of said sample vessels and maintain each of said sample vessels in a respective position such that the longitudinal axis of said each sample vessel extends at a respective angle substantially less than 90 degrees with respect to the horizontal; and

said magnet driver, is adapted to move each of a plurality of magnets proximate to an outer surface of a respective one of said sample vessels to permit said magnet to impose a magnetic influence on said stirrer in said respective sample vessel to move said stirrer in said respective sample vessel.

10. A system as claimed in claim 1, wherein:

said panel is adapted to maintain said sample vessel at said angle which is within the range of about 15 degrees to about 25 degrees with respect to the horizontal.

11. – 18. (Cancelled)

If there are any additional fees related to this Appeal Brief, such fees should be charge to Deposit Account No. 02-1666.

Respectfully submitted,

M Lindsey

Mark Lindsey
Agent for Appellants
Registration No. 52,515
(201) 847-6262

Dated: July 14, 2005.

Becton Dickinson and Company
1 Becton Drive, MC110
Franklin Lakes, New Jersey 07417
#95299v3